IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 19, 2007 Session

JEFFREY R. MCMAHAN v. SEVIER COUNTY, ET AL.

Appeal from the Circuit Court for Sevier County
No. 2004-0270-III Jon K. Blackwood, Senior Judge

No. E2005-02028-COA-R3-CV - FILED JULY 3, 2007

The plaintiff's complaint was filed April 20, 2004. In its present posture, this medical malpractice case involves the claim of the plaintiff, Jeffrey R. McMahan, that his left leg had to be amputated as a result of the malpractice of John D. Watson, M.D.; Southeastern Emergency Physicians, Inc. ("SEP"); Fort Sanders Regional Medical Center ("Ft. Sanders Knoxville"); and Fort Sanders Sevier Medical Center ("Ft. Sanders Sevier").[1] Each of these defendants filed a motion to dismiss. The two sides filed material in support of their respective positions, after which the trial court heard oral argument. Later, the court entered an order dismissing the plaintiff's complaint. The sole issue is whether the defendants are entitled to summary judgment based upon their claim that the plaintiff's complaint was filed outside the period of the applicable statute of limitations. We hold that the material relied upon by the defendants fails to establish the absence of a genuine issue of material fact as to whether the plaintiff "discover[ed], or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury," *see* ***Teeters v. Currey***, 518 S.W.2d 512, 517 (Tenn. 1974), more than one year before the date of filing of the original complaint. Accordingly, we vacate the trial court's grant of summary judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Charmaine Nichols, Knoxville, Tennessee, for the appellant, Jeffrey R. McMahan.

F. Michael Fitzpatrick, Knoxville, Tennessee, for the appellees, Fort Sanders Regional Medical Center and Fort Sanders Sevier Medical Center.

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[1] In his complaint, the plaintiff also alleged causes of action against Sevier County, the Sevier County Sheriff's Department, and another medical doctor. Those actions were either voluntarily nonsuited or dismissed by way of summary judgment. None of these claims are before us on this appeal.

James H. London, Margaret G. Klein, and Jennifer Pearson Taylor, for the appellees, John D. Watson, M.D., and Southeastern Emergency Physicians, Inc.

OPINION

I.

As far as the record now before us is concerned, the core facts are these. On April 16, 2003, the plaintiff was assaulted in Sevier County as a result of which he sustained, in addition to other injuries, a "laceration injur[y] to his left [ ] knee." According to an April 19, 2003, orthopedic consultation note in the record – and this aspect of the case is not in dispute – "[h]e sustained a penetrating wound to the left knee." The note goes on to state that the plaintiff was "uncertain whether or not the penetrating device was wood or metal."

On the day of the assault, the plaintiff was transported by the Sevier County Sheriff's Department to Ft. Sanders Knoxville where he was treated by Dr. Watson. At that time, again according to the April 19, 2003, consultation note, the plaintiff's "wound apparently was cleaned and sutured." The plaintiff does not dispute that Dr. Watson treated his wound. In fact, it is the cleaning aspect of Dr. Watson's treatment that the plaintiff claims was deficient.

In the early morning hours of April 17, 2003, the plaintiff, following his treatment at Ft. Sanders Knoxville, was transported to the Sevier County jail "on an outstanding warrant." According to the plaintiff's complaint, on April 17, 2003, while in jail, his "pain and symptoms continued to escalate," his "knee continued to swell," and "he was in significant pain." The plaintiff's complaint further recites that on April 18, 2003, he was transported to Ft. Sanders Sevier "for treatment by an orthopedic physician." The plaintiff alleges that the orthopedic doctor "declined to examine" him. He says the doctor "called in a prescription for [him] without seeing him or speaking with him about his symptoms of pain." The complaint goes on to state that he was "released . . . back into the custody" of the sheriff.

The complaint states that, on April 19, 2003, the plaintiff, while still in jail, went into septic shock and was transported by the Sevier County Sheriff's Department to Ft. Sanders Knoxville.[2] He says that by that time "it was . . . too late to save his leg" and, as a consequence, his left leg was amputated.

The plaintiff's complaint was filed on April 20, 2004, (1) more than one year after the treatment by Dr. Watson on April 16, 2003;[3] (2) more than one year after he was seen at Ft. Sanders Sevier on April 18, 2003; (3) more than one year after he was refused admittance to Ft. Sanders

[2] Apparently, on April 19, 2003, the plaintiff first went to Ft. Sanders Sevier, but, for some undisclosed reason, he was not admitted.

[3] The complaint states that Dr. Watson was acting "within the scope of his employment or affiliation with SEP."

Sevier on April 19, 2003; and (4) more than one year after the surgery to amputate his leg[4] at Ft. Sanders Knoxville on April 19, 2003.[5]

The complaint states, in very general terms, the alleged medical malpractice of the four defendants. However, at this juncture in the proceedings, the parties proceed on the assumption that the plaintiff's claim of malpractice relates to the alleged failure of the defendants to diagnose, remove, and/or otherwise address the presence of foreign objects in the plaintiff's left knee – objects that apparently got there as a result of the April 16, 2003, assault. The plaintiff's theory is that the presence of the foreign objects and the failure to timely extract them or otherwise treat their presence in his knee is what led to the amputation of his leg. The basic thrust of the defendants' positions, as set forth in their briefs, is that whatever it is that each of them supposedly did wrong, that "something" occurred *more* than one year before the filing of suit on April 20, 2004.

The plaintiff's basic position at trial and now on appeal is that the discovery rule applies and that, pursuant to this rule, his cause of action accrued within one year of April 20, 2004.

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. No presumption of correctness attaches to a trial court's judgment granting summary judgment. ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Our task is to review the record of the proceedings in the trial court to ascertain anew if the requirements of the summary judgment rule have been satisfied. ***Id.*** "The moving party has the burden of proving that its motion satisfies [the] requirements" of Tenn. R. Civ. P. 56. ***Id.***

In order to obtain judgment in a summary fashion, "[t]he movant must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense." ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585, 588 (Tenn. 1998) (citing ***Byrd v. Hall***, 847 S.W.2d 208, 215 n.5 (Tenn. 1993)). As can be seen, this case involves an affirmative defense, *i.e.*, the alleged failure of the plaintiff to timely file his suit.

In order to be considered in the summary judgment analysis, the proffered evidence must be such as to be admissible at trial, "but need not be in admissible form as presented in the motion." ***Byrd***, 847 S.W.2d at 215-16.

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[4] There is no suggestion in the complaint or the plaintiff's brief that the plaintiff is claiming *liability* as to Ft. Sanders Knoxville or any of the other defendants based upon the decision to amputate his leg or the surgery itself.

[5] The one-year anniversary of the April 19, 2003, treatment was April 19, 2004, a Monday. There is no allegation that this particular Monday was a holiday or that the courthouse was closed on that day. Hence, if the plaintiff's causes of action accrued on April 19, 2003, the last day it could be timely filed was April 19, 2004. As previously noted it was filed the next day, *i.e.*, April 20, 2004.

In assessing the proof before the trial court in this case, we "must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor." ***Carvell***, 900 S.W.2d at 26 (citing ***Byrd***, 847 S.W.2d at 210-11). The moving party is entitled to summary judgment if the facts and the conclusions to be drawn from those facts permit a person to reasonably reach only one conclusion. ***Id***.

III.

The general rule is that a medical malpractice cause of action must be filed within one year of the act of malpratice. T.C.A. § 29-26-116(a)(1) (2000).[6] An exception to this rule has come to be known as the "discovery rule."[7] The discovery rule provides that "the statute of limitations commences to run when the [plaintiff] discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have discovered the resulting injury." ***Teeters***, 518 S.W.2d at 517. "[A] plaintiff need not actually know the specific type of legal claim he or she has so long as the plaintiff is 'aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.'" ***Stanbury v. Bacardi***, 953 S.W.2d 671, 678 (Tenn. 1997) (quoting ***Roe v. Jefferson***, 875 S.W.2d 653, 657 (Tenn. 1994)).

IV.

In their brief, Dr. Watson and SEP take the position that the period of limitations during which the plaintiff "was required to bring this suit as to these Defendants ended on April 16, 2004." Alternatively, they claim that, even if the discovery rule is implicated by the facts of this case, the plaintiff was first aware of sufficient facts by April 19, 2003, at the latest, to trigger the accrual of his cause of action on that date. Hence, according to Dr. Watson and SEP, the last day suit could be filed was Monday, April 19, 2004. Ft. Sanders Knoxville and Ft. Sanders Sevier concur in this position.

Dr. Watson and SEP claim that the burden of proof in this case is on the plaintiff. In support of their position, Dr. Watson and SEP cite the case of ***Benton v. Snyder***, 825 S.W.2d 409 (Tenn. 1992). They apparently rely upon the following statement in that opinion:

> As Snyder correctly points out, in a case such as this, where a statute of repose defense has been asserted and established, the burden of proof shifts to the plaintiff to establish the exception to the statute being claimed.

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[6] T.C.A. § 29-26-116(a)(1) states that "[t]he statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104."

[7] The codified version of the discovery rule, which is found at T.C.A. § 29-26-116(a)(2), provides as follows: "In the event the alleged injury is not discovered within such one (1) year [statute of limitations] period, the period of limitation shall be one (1) year from the date of such discovery."

Id. at 414. Dr. Watson and SEP's reliance on ***Benton*** is misplaced. In ***Benton***, the Supreme Court was reviewing a *directed verdict* at the conclusion of all of the evidence in a *jury trial*. We are here dealing with the issue of *summary judgment*. The language of the Supreme Court's opinion in ***Benton*** must be read in the context of the procedural posture of that case. The quote in ***Benton*** has nothing to do with the burden of proof in the summary judgment analysis. In a summary judgment case, when the plaintiff puts the discovery rule at issue in response to the defendant's assertion of the statute of limitations as a bar to the plaintiff's claim, the burden remains on the moving party to prove the affirmative of its defense, *i.e.*, that the plaintiff discovered, or should have discovered, more than one year prior to the commencement of the action, that he or she was injured as a result of the wrongful conduct of another. While the summary judgment analysis certainly includes a shifting-of-the burden aspect, it is not the one addressed in ***Benton***.

V.

In the summary judgment analysis, the initial focus is on the material upon which the moving party relies. Hence, in the instant case, the defendants must demonstrate, by way of verified testimony and/or authenticated documents, all of which must be admissible at trial, that more than one year prior to the filing of suit, the plaintiff was "aware of facts sufficient to put a reasonable person on notice that he [or she] ha[d] suffered an injury as a result of wrongful conduct." ***Stanbury***, 953 S.W.2d at 678 (quoting ***Roe***, 875 S.W.2d at 657). Unless and until the defendant does this, the plaintiff is not required to show that he or she was *not* chargeable with knowledge of such facts. This important point is made in the Supreme Court's opinion in ***McCarley***:

> Initially, we find that the proper standard and burden shifting analysis applicable to summary judgment dispositions has not been applied. The appellate court acknowledged the moving party's burden of demonstrating the absence of material facts creating genuine issues for trial. The court, however, bypassed the moving parties' initial burden and addressed only the sufficiency of the non-moving parties' opposing evidence. We find that the court erred in focusing on the non-moving parties' burden without first addressing whether that burden was actually triggered.

960 S.W.2d at 587-88.

VI.

We now turn to the evidence upon which the defendants rely to support their common position that the plaintiff filed his cause of action outside the period of the applicable statute of limitations. The defendants rely upon facts gleaned from three sources: the plaintiff's complaint; the plaintiff's affidavit; and the consultation note of orthopedic surgeon, Dr. John E. Harrison, dated

April 19, 2003.[8] According to the defendants, the facts contained in these documents demonstrate that the plaintiff's cause of action was barred when he filed his complaint on April 20, 2004.

The defendants point to allegations in the plaintiff's complaint reflecting (1) that the plaintiff knew he had sustained a serious injury to his left knee on April 16, 2003, and knew that he had been advised by Dr. Watson that he was in need of treatment by an orthopedic specialist; (2) that, on April 18, 2003, the plaintiff went to Ft. Sanders Sevier because of his escalating pain and symptoms; and (3) that he was aware that the orthopedic surgeon at Ft. Sanders Sevier had declined to see him on that occasion. With respect to April 19, 2003, the Ft. Sanders defendants state in their brief that the plaintiff

> specifically knew that his knee and left leg were involved in a septic process; he knew that retained foreign bodies were in the left knee; he knew that he had an infection that had to be aggressively treated and in his own words, knew that his knee had to be 'cleaned out'; and he was advised by Dr. Harrison that there was a possibility that he would lose his left leg.

In his affidavit, the plaintiff states that "I did not know [on April 18, 2003] that foreign material was left in my knee and I certainly thought the wound would heal or the hospital would have kept me there." As to his time at Ft. Sanders Knoxville on April 19, 2003, the plaintiff states that he has a "sketchy memory" of being told that his leg needed to be "opened and cleaned out." The Ft. Sanders defendants place emphasis on what the plaintiff did not say in his affidavit. They point out that the plaintiff did not expressly deny Dr. Harrison's statement in his note that he advised the plaintiff that "[the plaintiff] may require subsequent amputation of the left lower extremity."[9] They also call our attention to the fact that, while the plaintiff states in his affidavit that, as of *April 18, 2003***,** he was not aware of the presence of foreign material in his left knee, he never expressly states that he was not aware of the presence of such material as of *April 19, 2003.*

The focus in this case is on the critical issue of whether the plaintiff discovered or reasonably should have discovered, prior to April 20, 2003, that the defendants had failed to remove, diagnose and/or treat foreign objects in his left knee. The consultation note by Dr. Harrison dated April 19, 2003, is relied upon heavily by the defendants. It consists of four pages. The note addresses, in a seemingly comprehensive fashion, various matters including the evidence of "foreign matter" in the plaintiff's left knee. The defendants also rely on that portion of the plaintiff's affidavit wherein he admits that, on April 19, 2003, he had "vague" knowledge that his wound needed to be "opened and cleaned out," to support their position that the plaintiff knew, at the latest by April 19, 2003, that the

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[8] The record does not contain any depositions or references to same. We also have no affidavits of any of the doctors involved in the plaintiff's treatment.

[9] The plaintiff does say in his affidavit that "[t]he first time I learned [of] the surgical amputation of my left leg was after April 20, 2003 or April 21, 2003 when I reached down to scratch my leg and my leg was gone."

presence of foreign material in his left knee was causing his infection – an infection that caused the loss of his left leg on April 19, 2003.

VII.

Dr. Harrison's orthopedic consultation note was duly authenticated. The plaintiff does not argue, nor could he, that the note should not be considered in our summary judgment analysis. Dr. Harrison's pertinent statements in that document would clearly be admissible were this case to go to trial. Hence, the note can be considered by us at this juncture in the proceedings. *See* ***Byrd***, 847 S.W.2d at 215-16.

Dr. Harrison's note includes, in the "Reason for Consultation" section, his statement that he saw the plaintiff for "[a]ssessment of left knee, rule out septic arthritis, also rule out necrotizing fasciitis left calf and thigh." Following this is the "History" which includes the statement that the plaintiff was transferred from Ft. Sanders Sevier "with the diagnosis of septic shock . . . thought to be secondary to a penetrating wound in the left knee sustained approximately three days earlier." Among many other things, the "History" contains the statement of Dr. Harrison that he was "asked to see the patient on an urgent basis for consideration of knee arthrotomy and debridement."[10]

The next part of the consultation note is entitled "Past History." This part includes statements made by the plaintiff regarding work history, alcohol use, and his arrest record. The following section — "Physical Examination" – states, among other things, that "[the patient] is alert."

The following section entitled "Pertinent Orthopedic Findings," in its entirety, is as follows:

> Confined to the left lower extremity where he is noted to have moderate swelling of the left thigh, calf, knee and foot. His foot is somewhat cool and clammy and there are diminished pulses in the foot. Capillary refill is diminished. There is diffuse ecchymosis in the left leg in the pretibial area and gastrocs. There is a freshly sutured 4-cm wound in the infrapatellar area overlying the patellar tendon. There is a marked amount of subcutaneous fluid around the knee. The patient is exquisitely tender diffusely around the knee and in his calf along the lateral thigh and medial thigh, and posterior thigh up to the upper third of the thigh. The patient's pain above and below the knee he says is equal. He has weak movements in his foot and ankle. He has intact sensation. Right lower extremity is unremarkable to examination. A faint reddish hue is noted

[10] "Debridement" is defined in a non-medical dictionary as a "[s]urgical excision of dead, devitalized, or contaminated tissue from a wound." Webster's II New Riverside University Dictionary 51 (Anne H. Soukhanov ed., 1994).

> throughout the thigh around the knee and in the left leg between the knee and ankle. The patient is too painful to tolerate any movement of his knee more than a few degrees. He is unable to straighten his knee on his own and holds the knee flexed to about 30-degrees. He is too painful to tolerate ligament assessment of the knee.

This is followed by the "X-rays" section, which section includes the following:

> There is also what appears to be significant foreign matter over the medial side of the knee at and just below the knee joint. There is also a small amount of particulate foreign material in the infrapatellar area as seen on the lateral view and also a small amount on the AP view seen over the anterolateral aspect of the knee.

In the "Clinical Diagnoses," Dr. Harrison noted, among other diagnoses, "[r]etained foreign body left knee periarticular area" and "[s]eptic shock (Gram-negative sepsis)."

Finally, in the "Assessment" section – the last section – Dr. Harrison recites the following:

> This patient has a severe problem effecting [sic] his left lower extremity. He has [been] seen concurrently with Dr. Schuchmann of General Surgery. The patient was advised of the severity of his injury and the need for urgent debridement of his wound in the left knee as well as exploration of his leg and thigh. He was advised that wound debridement is urgently needed. He was advised that if he does have a septic process which is too advanced to maintain leg viability that he may require subsequent amputation of the left lower extremity. Risks and benefits of surgery are reviewed with him. He is desirous of proceeding as recommended. I have discussed the patient's findings at length with Dr. Schuchmann. Dr. Schuchmann will be the primary Surgeon for this procedure, as it likely will involve extensive fasciotomies and debridement of the thigh and calf. I will assist for the orthopedic portion of the procedure, i[.]e. knee arthrotomy and debridement, and any repair as indicated.

The defendants argue that this note together with other evidence recited by us in this opinion show the plaintiff first knew of the factual predicate underlying his malpractice claims no later than April 19, 2003. We find *no* evidence to support this assertion.

The crux of the plaintiff's complaint is that, as a result of the assault on April 16, 2003, foreign materials were introduced into the laceration of his left knee and that the defendants failed to remove all of these materials or were otherwise negligent with respect to the presence of them in the wound – a wound that was initially cleaned and sutured by Dr. Watson on April 16, 2003. The

defendants, on the other hand, take the position that the parties' filings in support of and in opposition to summary judgment, taken together, show that the plaintiff was first aware of the presence of these foreign bodies no later than April 19, 2003.

While Dr. Harrison's consultation note clearly shows that the doctor was aware of "foreign matter" in the left knee on April 19, 2003, there is no statement in that note reflecting that the doctor communicated this specific information to the plaintiff. For us to conclude that Dr. Harrison told the plaintiff of the foreign matter would be to engage in rank speculation. More importantly, it would be contrary to our charge to view the evidence "in the light most favorable to the nonmoving party." ***McCarley***, 960 S.W.2d at 588. He does not say that he told the plaintiff and we cannot assume that he did.

The defendants rely upon other evidence to support their common position. They point to the following facts: (1) the plaintiff knew his knee and left leg were in a septic process; (2) he knew, on April 19, 2003, that his leg had to be "cleaned out"; (3) he was also aware of his severe pain which, in his words, "was escalating"; and (4) he knew that his condition was getting progressively worse.

It is clear that the plaintiff knew, as of April 19, 2003, that the injury from the April 16, 2003, assault was not getting better, but rather was getting worse — a lot worse. He might even have suspected that he did not get a good result from the professional services rendered by Dr. Watson and possibly others. But, just as a bad result associated with a medical treatment or procedure, in and of itself, is not proof of malpractice, *see* ***Butler v. Molinski***, 277 S.W.2d 448, 452-53 (Tenn. 1955), the fact that a traumatic injury, after medical care, gets worse instead of better, without more, does not demonstrate that the injured individual has discovered or should have discovered that the worsening condition is the result of the wrongful conduct of a health care provider involved in the care and treatment of the traumatic injury.

The key fact in this case is the presence of foreign material in the plaintiff's wound. There is no evidence before us reflecting that the plaintiff knew or had reason to know, on or before April 19, 2003, that this material was in the wound.

We hold that the facts in the record upon which the defendants rely do not demonstrate the absence of a genuine issue of material fact such as to support the defendants' position that they are entitled to summary judgment on their defense of the statute of limitations. We further hold, under ***McCarley***, that the plaintiff's burden to come forward with evidence demonstrating that there is a genuine issue of material fact on the statute of limitations defense "was [never] actually triggered." ***Id***., 960 S.W.2d at 587-88. Summary judgment is not appropriate in this case.

VIII.

The judgment of the trial court is vacated. This case is remanded to the trial court for further proceedings. Costs on appeal are taxed to the appellees, Fort Sanders Regional Medical Center, Fort

Sanders Sevier Medical Center, John D. Watson, M.D., and Southeastern Emergency Physicians, Inc.

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CHARLES D. SUSANO, JR., JUDGE